

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

NOTICE OF PROPOSED RULEMAKING

VOCATIONAL REHABILITATION

TITLE 8, CALIFORNIA CODE OF REGULATIONS, SECTION 10124.1.

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in him by Labor Code Sections 133, 138.4, 139.5 and 5307.3, proposes to adopt regulations, by amending Subchapter 1.5 of Chapter 4.5, Title 8, California Code of Regulations, commencing with Section 10124.1. The regulations concern the provision of vocational rehabilitation services.

PUBLIC HEARING:

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, oral or in writing, with respect to the above noted subject on the following date:

Date: March 1, 2001 (Thursday)
Time: 10:00 AM to 5:00 PM or Conclusion of Business
Place: Gov. Hiram W. Johnson State Office Bldg.
Auditorium
455 Golden Gate Avenue
San Francisco, CA 94102

Please note that public comment will begin promptly at 10:00 AM and will conclude when the last speaker has finished his or her presentation. If public comment concludes before the Noon recess, no afternoon session will be held. The Administrative Director requests, but does not require, that any persons who make oral comments at the hearing also provide a written copy of their comments.

AUTHORITY AND REFERENCE:

The Administrative Director of the Division of Workers' Compensation, is undertaking this regulatory action pursuant to the authority vested in him by Labor Code Sections 133, 138.4, 139.5 and 5307.3, to adopt regulations to implement, interpret and make specific Labor Code Sections 139.5 and 4636.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW:

The Administrative Director of the Division of Workers' Compensation proposes to adopt regulations concerning the provision of vocational rehabilitation services. Section 10124.1 is proposed which will address the determination of vocational feasibility by the Qualified Rehabilitation Representative pursuant to Labor Code Section 4637(a).

1. Proposed Section 10124.1.

Labor Code Section 139.5 provides for the provision of vocational rehabilitation services to persons who are determined to be qualified injured workers. In order to be deemed a "qualified injured worker", Labor Code Section 4635(a) requires that the employee's expected permanent disability permanently preclude the employee from returning to his or her usual and customary occupation, and that the employee be vocationally feasible. Labor Code Section 4635(a)(2) provides that "vocational feasibility" means that the employee can reasonably be expected to return to suitable gainful employment through the provision of vocational rehabilitation services.

Under Labor Code Section 4637(a), it is the responsibility of the Qualified Rehabilitation Representative (QRR) to determine if the employee is vocationally feasible. Existing regulations do not provide specific guidance to Qualified Rehabilitation Representatives on the steps to be pursued in determining vocational feasibility. In addition, existing regulations do not adequately address the reporting requirements of Qualified Rehabilitation Representatives on the issue of vocational feasibility.

Proposed Section 10124.1 enumerates possible steps that may be pursued by a QRR during the process of arriving at a determination of vocational feasibility. Furthermore, Section 10124.1 clarifies the reporting requirements of Qualified Rehabilitation Representatives on the issue of an employee's vocational feasibility. Finally, proposed Section 10124.1 explains the process that may be pursued by employees who dispute a finding that they lack vocational feasibility.

STATE REIMBURSABLE MANDATE:

The Administrative Director of the Division of Workers' Compensation has determined that the proposed regulations will not impose any new mandated programs on any local agency or school district. The California Supreme Court has determined that an increase in workers' compensation benefit levels does not constitute a new State mandate

for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. (*County of Los Angeles v. State of California*, 43 Cal.3d 46 (1987)). The requirements imposed on all employers by these proposed regulations, although not a benefit level increase, is similarly not a new State mandate because the regulations apply to all employers, private and public, and not uniquely to local governments.

COST OR SAVINGS TO LOCAL AGENCIES OR SCHOOL DISTRICTS:

The regulations proposed herein may, from time to time, impose costs on local agencies and school districts. Any such costs, however, will be non-discretionary because the requirement that every employer contribute to the funding of California's workers' compensation programs is a statutory obligation. Furthermore, any such costs are non-reimbursable because the requirement on employers to contribute to the funding of California's workers' compensation programs is not unique to local agencies or school districts and applies to all employers alike, public and private, including the State of California.

COST OR SAVINGS TO STATE AGENCIES:

The proposed regulations may, in certain situations, impose costs on State agencies. Any such costs are non-reimbursable, however, since the requirement that employers contribute to the funding of California's workers' compensation programs is not unique to State agencies and applies to all employers alike, both public and private.

COST OR SAVINGS IN FEDERAL FUNDING TO THE STATE:

The proposed regulations will not affect any federal funding.

DETERMINATION REGARDING SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS:

The Administrative Director declares that he has initially determined that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. Proposed Section 10124.1 does not mandate the submission of any new additional reports, but instead clarifies the content and format of reports which are currently required by Labor Code Section 4637(a) and Title 8, California Code of Regulations, Sections 10132.1 and 10133.1.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Proposed Section 10124.1 does not require additional reporting by Qualified Rehabilitation Representatives, but merely provides guidance on the content and format of the reports which they are already required to submit under Labor Code Section 4637(a) and Title 8, California Code of Regulations, Sections 10132.1 and 10133.1.

ECONOMIC IMPACT ON SMALL BUSINESSES:

The Administrative Director has determined that the proposed regulations will not have an impact on small businesses. (See discussion under *Economic Impact on Private Persons or Businesses*, above.)

ASSESSMENT OF EFFECTS ON JOB AND/OR BUSINESS CREATION, ELIMINATION OR EXPANSION:

The Administrative Director has determined that the proposed regulations will have no effect on the creation or elimination of jobs or existing businesses within California, or affect the expansion of current California businesses.

IMPACT ON HOUSING COSTS:

The Administrative Director has determined that the proposed regulations will have no effect on housing costs.

CONSIDERATION OF ALTERNATIVES:

The Administrative Director must determine that no reasonable alternative considered by the Division, or that has otherwise been identified and brought to the attention of the Division, would be more effective in carrying out the purpose for which these regulations are proposed, nor would it be as effective and less burdensome to affected persons than the proposed action.

PRESENTATION OF ORAL AND/OR WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION OF WRITTEN COMMENTS:

Members of the public are invited to present oral and/or written statements, arguments or evidence at the public hearing. In addition, any person may submit written comments on the proposed regulations, prior to the public hearing to:

Ms. Guia Carreon,
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

Those persons wishing to submit written comments by facsimile transmission (FAX) should utilize the following FAX number: (415) 703-4720. The address for submission of comments by electronic mail (e-mail) is: DWCRules@hq.dir.ca.gov.

Unless submitted prior to or at the public hearing, all written comments must be received by the agency contact person, no later than 5:00 PM on March 1, 2001. The Administrative Director prefers written comments to oral testimony. If you have provided a written comment, it will not be necessary to present oral testimony at the public hearing.

AVAILABILITY OF TEXT OF REGULATIONS AND STATEMENT OF REASONS:

An Initial Statement of Reasons has been prepared for the proposed regulations, in addition to the Informative Digest included in this Notice. The Initial Statement of Reasons and the text of the proposed regulations will be made available for inspection or provided upon written request. Please direct all such requests to the contact person who is identified below. In addition, the above cited materials may be accessed on the Division's internet homepage at: www.dir.ca.gov.

CONTACT PERSON:

Any interested person may inspect a copy, or direct questions regarding, the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the Rulemaking File. The Rulemaking File may be inspected by any interested person, and will be available for inspection at the Division of Workers' Compensation, 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102, between the hours of 9:00 AM and 4:30 PM, Monday through Friday. Copies of the proposed regulations, the Initial Statement of

Reasons, and any supplemental information contained in the rulemaking file may be requested in writing from the contact person:

Ms. Guia Carreon,
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The telephone number of the contact person is (415) 703-4600.

Note: In the event the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following backup contact person at the same address and telephone number noted above:

Richard J. Rosa, Esq.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING:

In compliance with Government Code Section 11346.8(c) and 1 CCR 44, if the Administrative Director makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be available for public comment for at least 15 days prior to the date on which the regulations are adopted.

AVAILABILITY OF FINAL STATEMENT OF REASONS:

Following its preparation, a copy of the Final Statement of Reasons mandated by Government Code Section 11346.9(a) may be obtained from the contact person indicated above. In addition, the Final Statement of Reasons will be posted on the Division's internet homepage, and may accessed at: www.dir.ca.gov.

AUTOMATIC MAILING:

A copy of this Notice, including the Informative Digest, the Initial Statement of Reasons, and the text of the proposed regulations, will automatically be sent to those interested persons on the mailing list of the Administrative Director of the Division of Workers' Compensation, and to all persons who have requested notice of hearing as required by Labor Code Section 5307.4.

If adopted, the regulations as proposed will appear sequentially in the California Code of Regulations at Title 8, Chapter 4.5, Subchapter 1.5, commencing with Section 10124.1.

§ 10124.1. Identification of Vocational Feasibility

(a) The Qualified Rehabilitation Representative (QRR) selected pursuant to Labor Code section 4637(a)(5) shall determine the employee's "vocational feasibility" as defined in Labor Code section 4635(a)(2). The QRR's determination of vocational feasibility may include the following steps:

- (1) an initial evaluation meeting;
- (2) an assessment of existing employment skills;
- (3) an evaluation of the medical record to ascertain functional capacities;
- (4) an assessment of the injured employee's perception of his or her physical capacities;
- (5) an identification of vocational strengths;
- (6) an identification of factors that may prevent or enhance participation in vocational rehabilitation services; and
- (7) a consideration of vocational/work evaluation services when appropriate.

(b) The QRR shall prepare an initial report using DWC Form RU-120 addressing the employee's vocational feasibility prior to completing the "Vocational Rehabilitation Plan", DWC Form RU 102. The QRR shall thereafter continue to address the employee's vocational feasibility using DWC Form RU-121. For employees injured on or after 1/1/94, the fees for reports required by this section shall be attributable to the maximum aggregate fees provided for in Sections 10132 and 10125.

(c) The QRR's report of vocational non-feasibility shall identify the specific factor(s) preventing the employee from benefiting from the provision of vocational rehabilitation services. The report shall further identify any recommended action the employee should pursue in order to attain vocational feasibility.

(d) Where the QRR determines an employee lacks vocational feasibility, the claims administrator may, after notice to the employee pursuant to Sections 9812(d) or 9813(a)(3), discontinue vocational rehabilitation services and vocational rehabilitation temporary disability or maintenance allowance payments.

(e) The employee may dispute the claims administrator's discontinuance of benefits under subdivision (d) by filing a "Request for Dispute Resolution", DWC Form RU-103, pursuant to Section 10127(c) or (d). Notwithstanding Section 10127(e), the Rehabilitation Unit shall consider the dispute on an expedited basis, and shall issue a determination within ten (10) days of receipt of the RU-103.

Note: Authority cited: Sections 133, 138.4, 139.5, 5307.3, Labor Code.
Reference: Sections 4635, 4637, Labor Code.

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INITIAL STATEMENT OF REASONS

Subject Matter of Proposed Regulations:

**Title 8, California Code of Regulations, Section 10124.1.
Identification of Vocational Feasibility.**

BACKGROUND TO REGULATORY PROCEEDING:

Labor Code Section 4637(a) provides that a Qualified Rehabilitation Representative, selected by the claims administrator in agreement with the employee, is responsible for determining if an employee is vocationally feasible. The Administrative Director of the Division of Workers' Compensation proposes to adopt Section 10124.1, which enumerates steps which a Qualified Rehabilitation Representative may pursue when determining an employee's vocational feasibility. In addition, proposed Section 10124.1 clarifies the reporting requirements of Qualified Rehabilitation Representatives on the issue of vocational feasibility, as well as the process by which an employee may dispute a claims administrator's discontinuance of benefits because of a finding of vocational non-feasibility.

(1) Section Proposed: 10124.1.

Problem Addressed:

Labor Code Section 139.5 provides for the provision of vocational rehabilitation services to qualified injured workers. In order to be deemed a "qualified injured worker", Labor Code Section 4635(a) requires that the employee's expected permanent disability will permanently preclude the employee from returning to his or her usual and customary occupation, and that the employee be vocationally feasible. Labor Code Section 4635(a)(2) provides that "vocational feasibility" means that the employee can reasonably be expected to return to suitable gainful employment through the provision of vocational rehabilitation services.

Under Labor Code Section 4637(a), it is the responsibility of the Qualified Rehabilitation Representative to determine the employee's

vocational feasibility. Currently, there are no regulations providing guidance to Qualified Rehabilitation Representatives regarding the steps which they may pursue in order to determine if the employee is vocationally feasible. Secondly, existing regulations do not sufficiently address the specific reporting requirements of the Qualified Rehabilitation Representative on the issue of vocational feasibility. Consequently, the Rehabilitation Unit of the Division of Workers' Compensation has encountered situations where Qualified Rehabilitation Representatives are inadequately addressing the issue of vocational feasibility in their reports, or are failing to report on this issue utilizing the correct forms. Moreover, it has been determined that employees who are found to lack vocational feasibility are not always afforded adequate notice of the factors preventing them from being found vocationally feasible, and they are frequently not advised of the possible remedial actions that they may pursue in order to remove or lessen impediments to vocational feasibility.

While it has been the custom of the Rehabilitation Unit to issue determinations on an expedited basis in disputes involving the discontinuance of vocational rehabilitation temporary disability or maintenance allowance payments, existing regulations do not require an expedited determination. Instead, existing Section 10127(a) only mandates an expedited rehabilitation conference and the issuance of a determination within ten days, where the claims administrator has issued a notice to withhold vocational rehabilitation maintenance allowance under Labor Code 4643, on the basis of the employee's failure to cooperate in the provision of vocational rehabilitation services. Because of the significant hardships that employees may experience as a result of the termination of benefits, the Division proposes to adopt Section 10124.1(e), which will require the Rehabilitation Unit to issue a determination within ten days of receipt of the RU-103 form, where the dispute involves the discontinuance of vocational rehabilitation temporary disability or maintenance allowance on the basis that the employee is not vocationally feasible.

Specific Purpose and Basis of Proposed Section 10124.1.

In order for an employee to be eligible to receive vocational rehabilitation services under Labor Code Section 139.5, an employee must be determined to be vocationally feasible. Pursuant to Labor Code Section 4637(a), the determination of vocational feasibility is made by a Qualified Rehabilitation Representative. The Division has concluded that proposed Section 10124.1 is necessary since there are currently no regulations providing guidance to Qualified Rehabilitation Representatives regarding the steps which they may pursue to

determine an employee's vocational feasibility, and existing regulations do not adequately address the QRR's reporting requirements relative to the issue of vocational feasibility. In addition, in order to assist employees who have been determined to not be vocationally feasible in possibly becoming vocationally feasible at a future date, proposed Section 10124.1(c) mandates that Qualified Rehabilitation Representatives list in their reports any action an employee may pursue in order to remove or lessen impediments to vocational feasibility.

Lastly, in order to promote more efficient resolution of vocational feasibility disputes, proposed Section 10124.1(e) will require the issuance of an expedited determination by the Rehabilitation Unit in cases where the employee disputes the claims administrator's discontinuance of vocational rehabilitation temporary disability indemnity or maintenance allowance, because it has concluded the employee is not vocationally feasible.

Business Impact

Proposed Section 10124.1 will not have a significant adverse economic impact on any businesses. The regulation does not require the submission of additional reports by Qualified Rehabilitation Representatives. Instead, proposed Section 10124.1 merely provides specific guidance on the content and format of reports which QRR's are already obligated to submit pursuant to Labor Code Section 4637(a) and Title 8, California Code of Regulations, Sections 10132.1 and 10133.1.

Specific Technologies or Equipment

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No more effective alternative has been identified by the Administrative Director at this time. The purpose of the present rulemaking is to solicit and consider alternatives.